Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Communications Assistance for	)	CC Docket No. 97-213
Law Enforcement Act	)	

REPLY COMMENTS OF AIRTOUCH COMMUNICATIONS, INC.

AIRTOUCH COMMUNICATIONS, INC.

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AirTouch Communications, Inc. ("AirTouch") submits this reply to the comments filed in response to the *Notice of Proposed Rulemaking* ("*CALEA NPRM*"). With one notable exception, the comments demonstrate a remarkable uniformity both in interpreting the relevant provisions of the Communications Assistance Law Enforcement Act ("CALEA") and in recommending the steps which the Commission should take. The one exception is the comments submitted by the Federal Bureau of Investigation ("FBI").[1] AirTouch therefore focuses this reply on the FBI's position.

INTRODUCTION AND SUMMARY

FBI Director Louis Freeh, in recommending the adoption of CALEA, testified that CALEA was a "remarkable compromise," achieved "a delicate, critical balance," and reflects "reasonableness in every position."[2] However, the FBI's actions and positions since

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[1] Two additional agencies — the Drug Enforcement Administration and the Texas Department of Public Safety — last week filed one page letters in support of the FBI's reply comments, which have not been filed. As these letters are limited to general support for the FBI's position, they do not warrant a separate response.

[2] Digital Telephony and Law Enforcement Access to Advanced Telecommunications Technologies and Services, Joint Hearings on H.R. 4922 and S. 2375 Before the

(continued...)

CALEA was enacted have not been reasonable.[3] For example, the FBI continues to claim that the industry standards implementing CALEA's assistance capability requirements are "technically deficient," yet it is unwilling to follow the procedure Congress established for such disputes — submitting deficiency petitions with the Commission.[4] And now, the FBI contends that the Commission should subject the industry to burdensome, costly and unnecessary regulations. It urges the adoption of these regulations without presenting any evidence that the industry has failed to cooperate fully with law enforcement over the past 30 years or that rigid, "one size fits all" rules would provide carriers with the flexibility needed to respond fully and promptly to authorized interceptions.

It is time for the Commission to resolve the ongoing dispute over the adequacy of the industry's standards, as CALEA directs and as commenters overwhelmingly support. The

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2 (...continued)
Subcommittee on Technology and the Law of the Senate on the Judiciary and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 2d Sess., at 112-14 (1994).

3 *See generally* Letter from Senator Patrick Leahy to Hon. Janet Reno and Hon. Louis J. Freeh (Feb. 4, 1998) ("Leahy Letter").

4 In addition, the FBI continues to ignore the statutory mandate to publish final capacity requirements, which the industry requires to design efficient CALEA-compliant equipment. *See, e.g.,* AirTouch at 5; USTA at 13-14. Congress also understood the important relationship between the capacity requirements and the design of the capability assistance requirements, *see* CALEA § 1002(a)(1), *codified at* 47 U.S.C. § 1003(a)(1), and it was for this reason that Congress directed the FBI to publish its capacity requirements "[n]ot later than one year after October 25, 1994," a deadline the FBI still has not met. *See* CALEA § 102(a)(1), *codified in* 47 U.S.C. § 1003(a)(1). Last October the FBI told Congress that it would finally publish its capacity requirements in January 1998, but the FBI has missed this own, self-imposed deadline as well. *See* Prepared Testimony of H. Michael Warren, Section Chief, FBI Information Resources Division, before the House Committee on the Judiciary Subcommittee on Crime Regarding the Implementation of CALEA (Oct. 23, 1997).

industry can promptly implement CALEA fully only if there is confidence that its standards are complete — confidence which Congress has determined only the Commission can provide. One point is clear, however. The FBI's delay in raising its "technical deficiency" arguments with the Commission as CALEA directs does *not* mean that in the interim the industry cannot take advantage of CALEA's "safe harbor" protection, as the FBI suggests.

The record evidence establishes conclusively that the industry needs an extension of the current October 25, 1998 implementation deadline. Even the FBI does not contest the fact that the industry needs additional time. As all commenters addressing the issue recommend, administrative efficiency would be enhanced if the Commission granted the industry a blanket extension of time, rather than require each carrier to submit its own, essentially redundant extension request.

The FBI also misconstrues the Section 109 "reasonably achievable" standard in arguing that one factor should be given "paramount consideration" over the other nine statutory factors. The FBI's unsupported argument is inconsistent with the statutory scheme which envisions that upgrades that are not "reasonably achievable" be funded by the FBI — rather than by carriers and their customers. Congress imposed this standard precisely as a check to prevent the FBI from imposing unreasonable costs on consumers.

The comments also demonstrate that all information services are excluded from CALEA's requirements — including voice mail and other information services which carriers provide. CALEA expressly provides that the term telecommunications carrier does "not include

persons or entities insofar as they are engaged in providing information services,"[5] and the legislative history is even more clear that "all information services" are excluded.[6]

All commenters addressing the issue also agree that resellers must be included within CALEA's definition of telecommunications carrier. Not only would such action be consistent with long-standing Commission precedent, but a decision that resellers are not subject to CALEA would preclude facilities-based carriers from effectuating interceptions on reseller customers — a "loophole" Congress clearly did not intend to create with CALEA.

CALEA authorizes the Commission to "prescribe such rules *as are necessary.*" The record evidence conclusively demonstrates that the Commission's proposed carrier security and recordkeeping rules are not necessary and would be both burdensome and costly to implement. Indeed, as the Commission has acknowledged, carriers "already have in place practices for proper employee conduct and recordkeeping," and they have ample incentive to ensure their employees continue to comply with all legal requirements — if only "to protect themselves from suit by persons who claim they were the victims of illegal surveillance."[7] The FBI has not demonstrated that the rules its supports are necessary given the 30-year history of successful law enforcement/industry cooperation over interceptions.

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5 CALEA § 102(8)(c)(i), *codified at* 47 U.S.C. § 1001(8)(C)(i).

6 H.R. Rep. No. 103-827, 103d Cong., 2d Sess., at 18 (1994)("House Report").

7 *CALEA NPRM* at ¶ 74.

DISCUSSION

I. The Commission Should Address Promptly the Issues Raised in CTIA's Petition

The comments addressing the issues overwhelmingly encourage the Commission to exercise its statutory authority to resolve expeditiously the ongoing dispute over the set of assistance capability functions which CALEA requires the industry to furnish to law enforcement.[8] The FBI's assertion that it would be "inappropriate" for the Commission to address this dispute is contrary to the plain commands of CALEA and would undermine the Congressional intent (and seemingly the FBI's own interest) that CALEA be implemented promptly.[9]

AirTouch demonstrated in its comments that the industry, having done its job by publishing standards, is now caught between the proverbial "a rock and a hard place."[10] Congress determined that CALEA's assistance capability requirements would be implemented most efficiently by the industry establishing national standards.[11] To encourage the industry to

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8 *See, e.g.,* AirTouch at 13-15; Bell Atlantic Mobile at 2; BellSouth at 15-16; CTIA at 3-6; Motorola at 7-9; PrimeCo at 2-4; Rural Telecommunications Group ("RTG") at 4-6; USTA at 8-11.

9 *See* FBI at ¶ 88.

10 *See* AirTouch at 13-15.

11 *See* CALEA § 107(a)(1), *codified at* 47 U.S.C. § 1006(a)(1). *See also* FBI at ¶ 88 (industry standards are "vital to the preservation of law enforcement's electronic surveillance capability"); FBI/U.S. Department of Justice, *CALEA Implementation Plan,* Report to Congress, at § II.C (March 3, 1997)("CALEA contemplated the development of publicly available technical requirements or standards by the telecommunications industry.").

develop these standards, Congress enacted a "safe harbor" provision so carriers using standards-compliant equipment would be deemed in compliance with CALEA's capability requirements.[12]

The industry has now published appropriate assistance capability implementation standards to take advantage of this "safe harbor" protection.[13] However, civil rights groups contend that this standard goes too far and violates CALEA by invading unlawfully consumer privacy rights.[14] Similarly, Senator Leahy, a member of the Senate Judiciary Committee, has stated that "[c]ertain of the [FBI]s punch list items appear far beyond the scope and intent of CALEA."[15] On the other extreme, the FBI takes the position that the industry standard does not go far enough and that the standard is "technically deficient" because it supposedly "lacks certain requisite functionality to fully and properly conduct lawful electronic surveillance."[16]

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12 *See* CALEA § 107(a)(2), *codified at* 47 U.S.C. § 1006(a)(2). *See also* FBI at 38 ¶ 89 (Congress adopted safe harbor provision "[t]o give impetus to such efficient and industry-wide standards efforts."). Importantly, carriers are not required to use the industry standard in meeting their CALEA obligations. *See* House Report, note 6 *supra*, at 27 ("Compliance with the industry standards is voluntary, not compulsory. Carriers can adopt other solutions for complying with the capability requirements.").

13 *See* Telecommunications Industry Association ("TIA"), *Lawfully Authorized Electronic Surveillance,* J-STD-025 (Dec. 5, 1997); Sprint Spectrum at 3-5. As AirTouch has explained, this standard is an interim/trial use standard only because the law enforcement community, at the FBI's recommendation, has been unwilling to approve the standard because it thinks the industry standard is incomplete. *See* AirTouch at 7-11.

14 Center for Democracy and Technology, Electronic Frontier Foundation, and Computer Professionals for Social Responsibility ("CDT/EFF/CPSR") at 5 (The industry standard, J-STD-025, "fails to satisfy the privacy protections of the wiretap laws and fails to comply with CALEA's requirement to 'protect the privacy and security of communications . . . not authorized to be intercepted.'").

15 Leahy Letter at 2.

16 FBI at 37-38 ¶ 88. *See also* Letter from Stephen R. Colgate, Assistant Attorney General, (continued...)

Congress has expressly charged the Commission with the responsibility to resolve these kinds of disputes, stating that "[t]he FCC retains control over the standards" and that CALEA "provides a forum at the [FCC] in the event a dispute arises over the technical requirements or standard."[17] There is, therefore, no basis to the FBI's assertion that it would be "inappropriate" for the Commission to address the dispute over the technical sufficiency of the industry standards.[18]

Equally baseless is the FBI's suggestion that the industry cannot take advantage of the safe harbor provision because of *its* belief that the industry standard is deficient.[19] In the first place, the industry may now take advantage of the safe harbor protection because it has published standards meeting the Congressional requirement — that is, standards "designed in good faith to implement the assistance requirements."[20] Moreover, under CALEA *only* the Commission has the authority to determine that the industry standards are deficient and that, as a

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16 (...continued)
to Jay Kitchen, Personal Communications Industry Association (Feb., 3, 1998).

17 House Report, note 6 *supra*, at 27. *See also* CALEA § 107(b), *codified at* 47 U.S.C. § 1006(b); House Report at 22-23 ("The legislation gives industry, in consultation with law enforcement and subject to review by the FCC, a key role in developing the technical requirements and standards that will allow implementation of the requirements.").

18 Also without merit is the FBI's contention that the Commission should defer addressing its arguments on industry standard "deficiency" because the process of developing standards is "ongoing." *Id.* In the industry's view, the standards process is complete.

19 *See* FBI at ¶¶ 87-90.

20 House Report, note 6 *supra*, at 26.

result, the industry cannot take advantage of the safe harbor provision.[21] Thus, if the FBI believes that the industry standard is "technically deficient," it is obligated under CALEA to convince the Commission of its arguments. The FBI's decision to delay raising its "deficiency" claims with the Commission does *not* mean that, in the interim, the industry cannot take advantage of the safe harbor protection afforded by Congress.[22]

The Cellular Telecommunications Industry Association ("CTIA") filed last July a petition asking the Commission to confirm that the standards the industry was developing implement fully CALEA's assistance capability requirements and that therefore the FBI's "technical deficiency" arguments lack merit.[23] As all commenters other than the FBI acknowledge, the time is now ripe for the Commission to exercise its statutory responsibility to resolve the disputes over the specific capabilities CALEA requires the industry to provide law enforcement and to confirm, as CTIA has requested, that the industry standard satisfies fully CALEA's assistance capability requirements. The industry can properly implement CALEA only if there is confidence that its standards are complete — confidence which Congress has specified only the Commission can provide. Moreover, given the endless controversy over the adequacy of the standards, the industry is entitled to know that it has taken all necessary steps to take advantage of the safe harbor protections which Congress has provided for the industry.

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21 *See, e.g.,* CALEA § 107(b), *codified at* 47 U.S.C. § 1006(b); House Report, note 6 *supra,* at 22-23 and 26-27.

22 CALEA authorizes the FBI to "consult" with the industry in the design of implementing standards; CALEA does not authorize the FBI to veto industry developed standards. *See* CALEA § 107(a), *codified at* 47 U.S.C. § 1006(a).

23 *See In the Matter of Implementation of Section 103 of the Communications Assistance for Law Enforcement Act*, Petition for Rulemaking, CTIA Petition, filed July 16, 1997.

II. The Record Evidence Conclusively Establishes That a Blanket Extension of Time Is Necessary

CALEA directs carriers to comply with the assistance capability requirements by October 25, 1998.[24] However, CALEA also authorizes the Commission to grant one or more extensions of this implementation deadline if it determines that compliance with the capability requirements "is not reasonably achievable through the application of technology available within the compliance deadline."[25]

The comments document that no carrier will be ready to meet the Section 103 assistance capability requirements by October 25, 1998, because necessary CALEA modifications will not be available prior to that date. Consequently, the industry comments uniformly recommend that the Commission enter a blanket extension for the entire industry because no purpose would be served by requiring each carrier to prepare its own extension request or by having the Commission's finite resources expended on processing hundreds of carrier-specific extension requests.[26]

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24 *See CALEA NPRM* at ¶ 49 and n.171.

25 CALEA § 107(c)(2), *codified at* 47 U.S.C.§ 1006(c)(2). The Commission is mistaken in suggesting without explanation that extensions of time under Section 107 should also be evaluated under the reasonably achievable criteria contained in Section 109. *See CALEA NPRM* at ¶ 50. As the FBI and other commenters demonstrate, Sections 107 and 109 contain different criteria and standards because the two sections are designed to address two very different situations. *See, e.g.,* FBI at ¶¶ 97-99; Ameritech at 9-10; AT&T at 23-27; U S WEST at 38 n.66.

26 *See, e.g.,* 360 Communications at 7-8; Ameritech at 8-10; AMTA at 8; AT&T at 27-28; Bell Atlantic Mobile at 8-9; BellSouth at 18-19; CTIA at 6-8; Motorola at 1; Nextel at 15-16; OPASTCO at 6-8; PageNet at 13-15; PCIA at 3-6; PrimeCo at 5-6; Rural Telecommunications Group at 6-7; United States Cellular at 2-3; USTA at 13-14. Given that the standard for granting an extension is expressly set forth in CALEA and given that

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No one challenges the fact that CALEA-compliant equipment will *not* be available by October 25, 1998, less than nine months from now. As the President of the Telecommunications Industry Association ("TIA"), which represents over 600 U.S. telecommunications equipment suppliers, told Congress last October, "The October 25, 1998 deadline is not achievable. The window of opportunity has already closed."[27]

In this regard, even the FBI does not challenge the industry's need for an extension of time. In an Implementation Report submitted to Congress only two weeks ago,[28] the FBI acknowledged that "carriers cannot begin their deployment process until a solution is available," that technical difficulties will prevent most vendors from providing all the functionalities the FBI is seeking, and that three switch vendors — Lucent, Nortel, and Siemens — are expected to make "partial solutions" available to carriers sometime between 4Q1998 and

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26 (...continued)
there is an unquestioned need for entry of an industry-wide extension, AirTouch agrees with the Commission that there is no need for it to promulgate specific rules regarding extension requests. *See CALEA NPRM* at ¶ 50.

27 Prepared Testimony of Matthew J. Flanigan, TIA President, before the Crime Subcommittee of the House Committee on the Judiciary (Oct. 23, 1997). *See also* Leahy Letter at 3 ("given the current state of CALEA implementation, with no final capacity notice in place, no permanent industry standard in place for meeting the capability assistance requirements, and no final switch-based or network-based solution deployed, please advise me how you expect telecommunications carriers to meet the October 25, 1998 compliance date?").

28 *See* FBI/Department of Justice, "CALEA Implementation Report" (Jan. 26, 1998)("1998 Implementation Report"). The FBI did not volunteer this Report; rather, Congress required it because of concerns that the FBI was inhibiting CALEA's timely deployment. *Id.* at Executive Summary. But the FBI missed this Congressional deadline as well, submitting its Report on January 26, 1998, over three weeks after the January 4 deadline Congress imposed.

1Q2001.[29] The FBI is unable even to estimate when Motorola, AirTouch's major switch vendor, might be in a position to make CALEA-compliance modifications available to carriers, the FBI stating only that the two parties continue to "refine feature requirements." Given this state of affairs, even the FBI would not reasonably oppose an extension of time, especially when it acknowledges that vendors and carriers have made "good-faith efforts . . . in developing a CALEA solution."[30]

CALEA specifies that the Commission may extend the implementation deadline for a period "no longer than . . . the date that is two years after the date on which the extension is granted."[31] Because it is now known that the industry cannot meet the current October 25, 1998, implementation date and because it is further known that the industry will require at least two more years to implement CALEA's assistance capability requirements, the Commission should enter promptly a two-year extension.[32] If it is later determined that still additional time is

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29 1998 Implementation Report at 4, 6 and 14. The FBI further states that Bell Emergis is developing a switch independent "network solution" which may be available yet this year, although the FBI intimates that this solution may not be compatible with CMRS networks. *See id.* at 2-3 and 11. However, the FBI cannot seriously expect any carrier to purchase, install, and begin using within nine months untested equipment with which carriers have no familiarity — even assuming the vendor were capable of producing sufficient numbers of its product for all carriers.

30 *Id.* at 15.

31 CALEA § 107(c)(3)(B), *codified at* 47 U.S.C. § 1006(c)(3)(B).

32 While Section 107(c) of CALEA specifies that the Commission should consult with the FBI in its consideration of an extension of time, Congress further made apparent its intent that this consultation be public. Thus, as CTIA notes, the Commission should disclose on the record the FBI's participation in the factual analysis and any final decision regarding an extension, and this participation should be made in advance so the industry has an opportunity to respond. *See* CTIA at 9-10.

necessary, the Commission can exercise its statutory authority to enter another extension of time.[33]

III. The FBI Misconstrues the Section 109 "Reasonably Achievable" Standard

Under Section 109 of CALEA, a carrier may petition the Commission to determine whether requiring equipment deployed after 1994 to comply with CALEA's assistance capabilities requirements is "reasonably achievable."[34] If the Commission determines that CALEA modifications are not "reasonably achievable," then the carrier is under no obligation to meet the capability requirements unless the federal government agrees to pay the costs of complying with the requirements.[35]

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33 Congress made clear that the Commission may enter "one or more extensions of the deadline for complying with the assistance capability requirements." CALEA § 107(c)(1), *codified at* 47 U.S.C. § 1006(c)(1). Consequently, the Commission is in error in suggesting that it may grant an extension only through October 24, 2000. *Compare CALEA NPRM* at ¶ 49, *with* U S WEST at 37 n.65 and OPASTCO at 8-9.

34 *See* CALEA 109(b)(1), *codified at* 47 U.S.C. § 1008(b)(1); *CALEA NPRM* at ¶ 45. The Commission should reject the FBI's argument that Section 109 petitions should always be accompanied with estimated costs associated with the modifications at issue. *See* FBI at ¶¶ 94-95. In the first place, carriers could not now comply with such a rule because CALEA-compliant equipment does not currently exist. Even when such equipment does become commercially available, the proposed rule would be unnecessary because a petition supported by estimated cost data obviously will be more persuasive than a petition without such data. Carriers have every incentive to make their Section 109 petitions as complete and detailed as possible.

35 *See* CALEA 109(b)(2), *codified at* 47 U.S.C. § 1008(b)(2); *CALEA NPRM* at ¶ 46. The FBI is correct that the Section 109 "reasonably achievable" standard does "not apply to capacity compliance or reimbursement." FBI at ¶ 93. Congress adopted a different "safe harbor" provision with respect to the FBI's capacity requirements. Specifically, it has declared that carriers are under no obligation to meet the capacity requirements if they submit a statement of inadequate capacity and if the FBI decides not to fund the costs needed to acquire additional capacity. *See* 47 U.S.C. § 1003(d) and (e); House Report, note 6 *supra,* at 25.

Congress set forth 10 different factors which the Commission must consider in determining whether or not CALEA compliance is "reasonably achievable."[36] The FBI, however, asserts that one of the 10 factors — "the effect on public safety and national security" — should be given "paramount consideration."[37] This contention is baseless. If Congress had intended that one of the 10 specified factors be given "paramount consideration" as the FBI suggests, Congress could have easily said so.[38]

In fact, the FBI's proposed construction of the Section 109 "reasonably achievable" factors is directly contrary to the legislative intent. The primary issue in a Section 109 "reasonably achievable" proceeding is *not* whether a given capability will be deployed, but *rather* who will pay the cost of deploying the capability: carriers or the FBI. Congress included

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36 *See* CALEA 109(b)(1)(A)-(J), *codified at* 47 U.S.C. § 1008(b)(1)(A)-(J); *CALEA NPRM* at ¶ 45.

37 FBI at ¶ 96. The FBI supports its position by misquoting the preamble to CALEA. *Id.* In fact, the preamble states that CALEA is designed "to make clear a telecommunications carrier's duty to cooperate in the interception of communications for law enforcement purposes, *and for other purposes*" — the emphasized portion overlooked by the FBI. *See* House Report, note 6 *supra*, at 1. Thus, even if the FBI were correct that Section 109 should be interpreted solely by this one sentence preamble, the fact remains that the preamble addresses considerations *other* than meeting law enforcement's needs.

38 A review of CALEA's legislative history makes apparent that Congress did not intend to give law enforcement needs "paramount consideration." As even the FBI Director stated immediately prior to CALEA's enactment, CALEA "achieves a delicate balance of law enforcement, privacy, and telephone industry interests and concerns. . . . The legislation is a remarkable achievement because of its balanced, fair, and equitable treatment of all affected parties, both with regard to responsibilities and cost allocation." Letter from Louis J. Freeh, FBI Director, to Hon. Michael G. Oxley, at 1 (Oct. 4, 1994), *quoted in* 140 Cong. Rec. H10782 (Oct. 4, 1994). *See also* Remarks of Cong. Hyde, 140 Cong. Rec. H10779 (Oct. 4, 1994)(CALEA "seeks to carefully balance the needs of law enforcement, the interests of the telecommunications industry and the privacy rights of the American public.").

Section 109 precisely to prevent the FBI from imposing unreasonable costs on the industry (and, therefore, consumers) — or, in the words of Congressman Markey, to ensure that "law enforcement does not engage in 'gold-plating' of its demands."[39] Congress decided that the FBI should have the obligation to pay for implementation costs which are unreasonable, either because they are so large and would negatively impact rates or because the costs would exceed the expected benefits of the modification. If the responsibility for paying implementation costs is assigned to the FBI rather than carriers/consumers, the FBI will then be required to undertake a cost-benefits analysis to determine whether, given its current budget, it should fund the modification in question. This is precisely the procedure Congress intentionally established, and giving "paramount consideration" to only one statutory criterion as the FBI argues would undermine this process.

IV. All Information Services, Including Those Provided by Carriers, Are Excluded From CALEA's Requirements

The comments addressing the issue uniformly demonstrate that *all* information services are excluded from CALEA's requirements — including voice mail and other information services which telecommunications carriers provide.[40] CALEA expressly provides that the term telecommunications carrier does "*not* include persons or entities *insofar as they are*

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39 Remarks of Hon. Markey, 104 Cong. Rec. H10781 (Oct. 4, 1994).

40 *See, e.g.,* Ameritech at 2-3; BellSouth at 6; CTIA at 24-25; NTCA at 2; PageNet at 3-5; SBC at 8-9; USTA at 5; U S WEST at 6-9. *See also* CDT/EFF/CPSR at 21-22 ("Preserving competitive fairness was one of the objectives of the drafters of CALEA. It would be unfair to cover information services offered by telecommunications carriers but not cover information services offered by companies not providing telecommunications services.").

engaged in providing information services."[41] There is, therefore, no basis to conclude that the information services provided by non-carriers are exempt from CALEA's requirements while the competing information services provided by carriers are not exempt.[42]

The FBI's position on this subject is unclear.[43] However, there is no basis for the FBI's recommendation that the Commission use a "conservative" definition of information services.[44] To the contrary, Congress made clear its expectation that the Commission will expansively define the term information services.[45]

V. Resellers Are Subject to CALEA's Requirements

In response to the Commission's inquiry,[46] all commenters addressing the issue agree that resellers must be included within CALEA's definition of telecommunications

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41 CALEA § 102(8)(C)(i), *codified at* 47 U.S.C. § 1001(8)(C)(i)(emphasis added). In addition, the capacity assistance provision expressly states that the capacity requirements "do *not* apply to information services." CALEA § 103(b)(2)(A), *codified at* 47 U.S.C. § 1002(b)(2)(A)(emphasis added). *See also* House Report, note 6 *supra,* at 18 ("Also excluded from coverage are *all* information services"), and at 23 ("The storage of a message in a voice mail or E-mail 'box' is not covered by the bill.").

42 *Compare CALEA NPRM* at ¶ 20.

43 While the FBI "agrees" that "providers of exclusively information services are excluded from CALEA's requirements" (FBI at ¶ 29), it does not address the question specifically posed by the Commission — namely, whether information services provided by carriers are also excluded.

44 *Id.* at ¶ 29.

45 *See* House Report, note 6 *supra,* at 21 ("It is the Committee's intention not to limit the definition of 'information services' to such current services, but rather to anticipate the rapid development of advanced software and to include such software services in the definition of 'information services.'"). *See also id.* at 22-23 ("The Commission urges against overbroad interpretation of [CALEA's] requirements.").

46 *See CALEA NPRM* at ¶ 17.

carriers.[47] Such action would be consistent with Commission precedent.[48] More importantly, if resellers are not deemed to be a carrier and subject to CALEA, facilities-based carriers may be unable to effectuate authorized interceptions with respect to customers of resellers because they generally have "exclusive access to billing and other data that may be necessary for compliance with the court order."[49] Clearly, in enacting CALEA Congress did not intend to establish a new loophole whereby customers of resellers would be exempt from authorized interceptions.

VI. The FBI Has Not Demonstrated That New Commission Rules Regarding Internal Carrier Security Policies and Procedures Are Necessary Or Appropriate

CALEA authorizes the Commission to "prescribe such rules *as are necessary*" to implement the Act.[50] Comments filed by the industry uniformly take the position that the Commission's proposed carrier security procedure and recordkeeping rules are unnecessary and

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47 *See, e.g.,* Ameritech at 2; BellSouth at 5-6; GTE at 4-5; PageNet at 5-6; PCIA at 6-8; SBC at 6-7; USTA at 4.

48 The Commission has long held that resellers are common telecommunications carriers. *See Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261, 265 ¶ 8 (1976).

49 SBC at 7. Because facilities-based carriers do not know the identity of reseller customers and cannot match those customers with a particular telephone number, there is no basis for distinguishing between "pure" resellers, on the one hand, and "facility-based and switch-based resellers," on the other hand. *See* FBI at ¶ 24.

50 CALEA, Title II, § 301, *codified at* 47 U.S.C. § 229(a)(emphasis added). In promulgating new CALEA rules, the Commission is also subject to the Paperwork Reduction Act of 1995 which likewise requires the Commission to impose only those rules which are demonstrated to be "necessary" and to have "practical utility." *See* Pub. L. No. 104-13, 109 Stat. 163, *codified at* 44 U.S.C. § 3506(c)(2)(A). *See CALEA NPRM* at ¶ 53; AirTouch at 19.

would be both burdensome and costly to implement.[51] Further, as the Commission has acknowledged, carriers "already have in place practices for proper employee conduct and recordkeeping," and they have ample incentive to ensure their employees continue to comply with all legal requirements — if only "to protect themselves from suit by persons who claim they were the victims of illegal surveillance."[52]

Moreover, reliance on market forces rather than on government regulations has worked. The telecommunications industry has assisted law enforcement's interception requirements for 30 years, yet the record does not reveal any problems with the industry's implementation of its interception responsibilities or with its cooperation with law enforcement.[53]

Similarly, the legislative history of CALEA is silent on the industry's assistance to law enforcement's needs, further demonstrating that carrier implementation of court interception orders has not been a problem. As the Center for Democracy and Technology *et al.* states:

> There is no indication in the text of CALEA or its legislative history that Congress was concerned with the overall security of

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51 *See, e.g.,* Bell Atlantic Mobile at 3-4; BellSouth at 12-13; GTE at 8-9; PageNet at 6-10; PCIA at 10-12; Powertel at 3-4; SBC Communications at 17-18; 360 Communications at 2-3; USTA at 5-6; U S WEST at 13-16.

52 *CALEA NPRM* at ¶ 74. However, AirTouch cannot agree with the Commission's conclusion that the current rule proposals would allow carriers "to use their existing practices to the maximum extent possible." *Id.* Nor can AirTouch agree with the Commission's undocumented assertion that the costs carriers would incur to comply with these rule proposals will be "minimal."

53 *See, e.g.,* AT&T Wireless at 2 (noting it conducted over 1,300 interceptions in three metropolitan areas over a one-year period without a single security breach).

> interception operations when it enacted CALEA. Nor is there any evidence that Congress was concerned with the reliability of carrier personnel. The NPRM is thus flawed in proposing generalized requirements for carrier personnel security and recordkeeping.[54]

In contrast, the FBI supports some of the Commission's detailed rule proposals — although even it, too, recognizes that some of the proposals are unnecessary and could be counterproductive.[55] However, with respect to the proposals the FBI does support, the FBI does not present any facts demonstrating the need for new Commission regulations.[56] Indeed, the FBI

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[54] CDT/EFF/CPSR at 7. *See also id.* at 10 ("Nowhere in the legislative history of CALEA could we find any generalized concern about carrier security practices or about unauthorized wiretapping on carriers' outside plant."); at 15 ("CALEA was not intended to require any generalized changes in carrier practices with respect to the operational security of interceptions. The legislative history of CALEA does not contain any congressional findings or any suggestion in the testimony that existing industry personnel practices were inadequate to protect the integrity of intercept operations. There is no indication that Congress was concerned with the trustworthiness of carrier personnel in general."). CDT/EFF/CPSR instead recommend that the Commission "assure itself that carriers have appropriate computer security plans in place." *Id.* at 7-8. However, carriers already have strong incentives to develop such plans to preclude access by outsiders, such as hackers. Indeed, carriers have such plans today and continue to refine these plans as new capabilities (such as CALEA) are added to their networks. Moreover, the security concerns about which CDT/EFF/CPSR address would hardly be promoted by public disclosure of a carrier's highly sensitive computer security plans.

[55] *See, e.g.,* FBI at ¶ 47 (rules requiring definition of legal authorization "not necessary"); ¶ 51 (rules requiring list of exigent circumstances not necessary); ¶ 62 (rules requiring formal affidavit not necessary).

[56] The closest the FBI comes to presenting "facts" is its unsupported allegation that there have been "anecdotal reports" of instances where "carriers have refused to provide assistance to law enforcement even after being presented with a facially valid court order." FBI at ¶ 33. Even here, the FBI's undocumented assertion is difficult to understand. One of the reasons carriers have begun to centralize their security operations is to help prevent leaks (by minimizing the number of employees involved with interceptions) and to improve the expertise of those employees who remain involved. Yet the FBI complains that this centralization "complicates" its efforts. *See* FBI at ¶ 3.

(continued...)

freely acknowledges that carriers are "already required to act reasonably in hiring employees and in supervising their activities."[57] Thus, as GTE correctly notes, adoption of the rules the FBI supports would merely result in "pointless papershuffling" and "bureaucratic requirements that will surely occupy file drawers with masses of paper never looked at."[58] In addition, as a matter of law, generalized statements of need, unsupported by facts, are not sufficient to justify new government regulations.[59]

The Commission has held in the past that "all regulation necessarily implicates costs, including administrative costs, which should not be imposed unless clearly warranted."[60] Given the 30-year history of cooperation without any documented problems, there is no need, and certainly not a compelling need, for the Commission to promulgate carrier security and recordkeeping regulations now.

CONCLUSION

For all the forgoing reasons and those set forth in its comments, AirTouch recommends that the Commission (1) address promptly the ongoing dispute over the adequacy of

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56 (...continued)
The FBI cannot have it both ways.

57 FBI at 18 n.24.

58 GTE at 9-10.

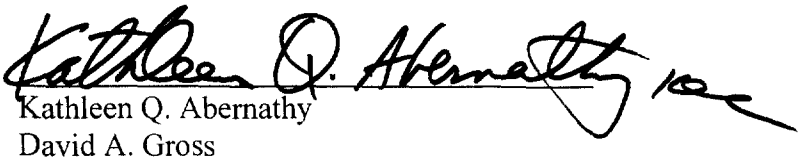
59 *See, e.g., AT&T* v. *FCC,* 974 F.2d 1351, 1354 (D.C. Cir. 1992)("An agency must nevertheless 'examine the relevant data and articulate a satisfactory explanation for its action.' Accordingly, we will not uphold an agency's action where is has failed to offer a reasoned explanation that is supported by the record.").

60 *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services,* CC Docket No. 94-54, *First Report and Order,* 11 FCC Rcd 18455, 18463 ¶ 14 (1994).

the industry assistance capability requirements and confirm that the industry's assistance capability standard satisfies CALEA's safe harbor protection; (2) grant a two-year extension of the current October 25, 1998 assistance capability implementation deadline; (3) reject the FBI's interpretation of the Section 109 "reasonably achievable" standard; (4) clarify that all information services, including those provided by carriers, are not subject to CALEA's requirements; (5) confirm that resellers, like all other carriers, are subject to CALEA's requirements; and (6) decline to impose new paperwork requirements which will only increase needlessly a carrier's cost of service.

Respectfully submitted,

AIRTOUCH COMMUNICATIONS, INC.



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